IV. RESPONDENTS ARE UNABLE TO PROVIDE ANY CONVINCING JUSTIFICATION FOR THE NINTH CIRCUIT'S ERRONEOUS HOLDING THAT PETITIONER WAS ON NOTICE HIS CONDUCT VIOLATED CLEARLY ESTABLISHED LAW.

Consistent with the Ninth Circuit's error, Respondents' are unable to articulate how *McKenzie* v. *Lamb,* 738 F.2d 1005 (9th Cir. 1984), clearly established Petitioner's conduct was excessive. As set forth in the Petition, *McKenzie* is factually distinguishable from *Baldwin*. *Baldwin* involved the placement of a weapon on the suspect's head prior to the suspect's handcuffing and the securing of the residence.

However, the circumstances in *McKenzie* transpired in the confined space of a hotel room after the suspects had been secured. The officers "pressed the barrels of their guns against appellants' heads and refused to identify themselves as police officers", and, when asked for identification, an officer "pressed the barrel of a gun between [the suspect's] eyes and replied, 'that's about all [the identification] you need.'" *McKenzie*, 738 F.2d at 1010-1011.

This Court has recognized the perils of entering an unknown home in the context of an arrest "unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." *Maryland* v. *Buie*, 494 U.S. 325, 333 (1990). The threat posed to Petitioner in executing a search warrant for narcotics in a residence is substantially similar to the threat recognized in *Buie*. Until handcuffed, Respondents posed a constant threat. Furthermore, the marijuana "grow room", as well as the rest of the residence

had not been secured. These factual distinctions are significant in that *McKenzie* fails to provide Petitioner fair notice that his actions were excessive. Therefore, Petitioner Potter is entitled to qualified immunity.

Finally, Respondents misstate the law of the Ninth Circuit declaring the existence of a "long standing and critical distinction between an assault, as occurred in Robinson, and a battery." (Opp'n to Pet. for Writ of Cert. at 14.) The majority opinion in *Robinson* v. *Solano County* refused to distinguish between an assault and battery with a weapon, whereas only the concurring opinion made such a distinction. 278 F. 3d 1007, 1017 (Fernandez, J. concurring) (9th Cir. 2002). As the majority opinion makes no distinction between assault and battery, the conduct at issue in Baldwin was not clearly established as excessive prior to the publication of the *Robinson* decision.

The law was not clearly established with regard to whether Petitioner Potter's conduct during the course of the search of Respondents' unsecured home was excessive. Therefore, Petitioner is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, Petitioner Jeffrey Potter respectfully requests this Court grant the petition and issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

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